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Supreme Court, U.S.
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No.

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IN THE

Supreme Court of the United States

THE CADLE COMPANY, PETITIONER

v.

JOSEPH M. FRIEDHEIM AND JOYCE A. FRIEDHEIM

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When an individual files for protection under the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, (the "**Bankruptcy Code**"), all of his real and personal property become property of the bankruptcy estate, 11 U.S.C. § 541(a), subject to a claim of exemption under federal or state law. *See* 11 U.S.C. § 522(b). A creditor may object to the claim of exemption. *See* Fed. R. Bankr. P. 4003(b). Although only the debtor benefits from the exemption and is uniquely in possession of evidence to support the exemption, Bankruptcy Rule 4003(c) provides that "the objecting party has the burden of proving that the exemptions are not properly claimed." Fed. R. Bankr. P. 4003(c) ("**Bankruptcy Rule 4003(c)**"). Bankruptcy Rule 4003(c) does not: define the applicable burden of proof; distinguish between burden of persuasion or burden of production; state whether such burden is applicable when a debtor elects state exemptions, and address the effect when a debtor claims state exemptions and the burden of proof under applicable state law differs from that prescribed under Bankruptcy Rule 4003(c).

This appeal addresses issues of first impression. First, when a debtor claims exemptions under state law and state law provides a burden of proof different than that applicable under Bankruptcy Rule 4003(c), which controls? Second, if Bankruptcy Rule 4003(c) controls, should a burden shifting requirement be read into Bankruptcy Rule 4003(c) to balance the equities between the parties?

RULE 29.6

Petitioner is not a publicly traded company. There is no parent or publicly held company owning 10% or more of the stock of Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner THE CADLE COMPANY ("**Cadle**") respectfully petitions that a Writ of Certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit entered April 20, 2008, because that decision decided an important question of federal law that has not been, but should be, settled by this Court.

OPINIONS BELOW

On November 28, 2006, the Bankruptcy Court entered its unpublished *Order on The Cadle Company's Objection to Debtor's Schedule C Exemptions* (the "**Order**"), (App. 13a-15a) Cadle appealed to the District Court.

On August 14, 2007, the District Court filed its unpublished *Memorandum Opinion and Order* ("**Opinion**") affirming the Bankruptcy Court's decision. (App. 3a-12a) Cadle appealed to the United States Court of Appeals for the Fifth Circuit (the "**Fifth Circuit**").

On April 29, 2008, the Fifth Circuit filed its *Per Curiam* decision affirming the decisions of the courts below. (App. 1a-2a)

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was filed on April 29, 2008. Pursuant to Supreme Court Rules 13.1 and 13.3, this petition has been filed within 90 days of the entry

of the Judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Bankruptcy Rule 4003(c) provides:

> (c) Burden of Proof. In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections.

Fed. R. Bankr. P. 4003(c)("**Bankruptcy Rule 4003(c)**").

STATEMENT

In 2005, Respondent/Debtors JOSEPH M. FRIEDHEIM and JOYCE A. FRIEDHEIM's (the "**Friedheims**") filed for protection under chapter 7 of the Bankruptcy Code. They claimed four individual retirement accounts (the "**IRAs**") totaling in excess of $375,000 as exempt under Texas law. [1] *See* Tex. Prop. Code Ann. § 42.0021 (Vernon 2000) ("**Section 42.0021**"). Section 42.0021 provides that individual retirement accounts are exempt from claims of creditors if they "qualify under the applicable provisions of the Internal Revenue Code ["**IRC**"] of 1986." *Id.* Cadle timely objected to the claim that the IRAs were exempt under Texas law.

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[1] All property of any value owned by the Friedheims, including the IRAs, was claimed as exempt, including a house owned free and clear worth almost $2,000,000.

Under Texas law, a debtor claiming an account exemption under Section 42.0021 must show that the account qualifies under the IRC. Only then does the burden shift to the party seeking to access the exempt property. Nevertheless, the Bankruptcy Court determined that Cadle held **the entire burden of proof**, production and persuasion, to establish the IRAs were not qualified under the IRC. (*See* App. 14a - Cadle bore "the burden of proving [by a preponderance of the evidence] that the Debtors' exemption are not properly claimed.") This conflicts with the burden of proof required under Texas law.

When a debtor claims exemptions under state law, the state's substantive burden of proof standards, if any, should apply in determining whether the debtor qualifies for the exemption, rather than the standard set forth in Bankruptcy Rule 4003(c). In such situations, Bankruptcy Rule 4003(c) represents an impermissible infringement on subtsantive rights. *See Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15 (2000); 28 U.S.C. § 2075.

Alternatively, if the Court determines that Bankruptcy Rule 4003(c) is nevertheless applicable, the Court should adopt a shift in burden standard applicable to Bankruptcy Rule 4003(c). Property claimed as exempt is *prima facie* exempt until the presumption of validity is rebutted. Once an objection is filed and "persuasive" evidence is presented to rebut the presumption of validity, the burden should shift to the claimant/debtor to "produce" a preponderance of evidence to support allowance of the claimed exemption.

REASONS FOR GRANTING THE PETITION

Cadle objected to the Friedheims' claim of exemption for the IRAs, questioning whether the IRAs qualified under the IRC. Cadle served discovery on the Friedheims seeking documentation evidencing that the IRAs were qualified. In response, the Friedheims produced booklets, pamphlets, applications, and statement of account. No documents showed definitively that the IRAs were approved and qualified under the IRC.

At the conclusion of an evidentiary hearing, the Bankruptcy Court ruled that Cadle had the entire burden of proof on the issue of whether the IRAs qualified under the IRC.[2]

The District Court affirmed. In its Opinion, the District Court states: "Neither the parties nor the court were able to find an articulation by the Texas state courts of the applicable standard of proof [under Section 42.0021] which must be met by the objecting party." (App. 8a) Instead of making an *Erie* guess as to what the Texas courts would do or certify the question to the Texas Supreme Court, *see* Tex. R. App. P. 58, the District Court defaulted to holding that

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[2] The Bankruptcy Court ruled in the alternative that, if the Friedheim's bore the burden of proof, i.e.,"if the Court's reading of Federal Rule of Bankruptcy Procedure 4003(c) and the case law is not correct, the question before the Court would be whether it is more likely than not that the IRAs are exempt under Texas law and federal law based on the record made this afternoon." (App. 14a) The Bankruptcy Court concluded that the Friedheims met this burden. The Bankruptcy Court's either/or ruling illustrates no legal analysis of the burden of proof issue.

Bankruptcy Rule 4003(c) would govern the burden of proof issue. It agreed with the Bankruptcy Court that Cadle bore the entire burden of proof.

Cadle appealed to the Fifth Circuit. The Fifth Circuit entered a *Per Curiam* decision which provides no basis to understanding why it affirmed the decisions below.

1. Summary of Argument

Discharge, the holy grail of bankruptcy, is a privilege, not a right. *See In re Juzwiak*, 89 F.3d 424, 427 (7th Cir. 1996). When an individual files bankruptcy, all of his real and personal property becomes property of the "bankruptcy estate" available to satisfy creditor claims. 11 U.S.C. § 541(a). However, a debtor may choose to exempt certain property from the reach of creditors by claiming such property as exempt under state or federal law. 11 U.S.C. § 522(b) ("**Section 522(b)**").

The debtor is the beneficiary of a claimed exemption. The debtor is uniquely in possession of facts and other evidence to support the exemption. Nevertheless, Bankruptcy Rule 4003(c) places the entire burden of proof on the objecting party to disprove the exemption. Not only is this patently unfair, it effectively results, in many cases, in exemption by declaration. In most cases, creditors do not have the economic resources to mount an effective challenge to claimed exemptions.

Bankruptcy Rule 4003(c) provides that the objecting party has the burden of proof; however, it

fails to distinguish between the burden of persuasion and the burden of production and does not state whether such burden is applicable when the debtor elects state exemptions. Bankruptcy Rule 4003(c) conflicts with Texas law regarding burden of proof when determining application of an exemption under Section 42.0021. Under Texas law the burden of production falls on the party claiming the exemption to provide evidence that he is entitled to the exemption. Because property claimed as exempt is effectively removed from the bankruptcy estate (at the debtor's request) and is, as a result, not available to be distributed to creditors, the debtor, not the creditor, should bear the initial burden of proving the validity of the exemption. Only then should the burden shift to the creditor to persuade that the exemption should be disallowed.

This Court should recognize a shifting burden inherent in Bankruptcy Rule 4003(c). Property claimed as exempt is *prima facie* exempt until the presumption of validity is rebutted. Once an objection is filed and "persuasive" evidence is presented to rebut the presumption of validity, the burden should shift to the debtor to "produce" a preponderance of evidence to support allowance of the claimed exemption.

2. Section 42.0021

Section 42.0021 provides, in pertinent part:

ADDITIONAL EXEMPTION FOR CERTAIN SAVINGS PLANS.

(a) In addition to the exemption prescribed by Section 42.001, a person's right to the assets held in or to receive payments, whether vested or not, under any stock bonus, pension, profit-sharing, or similar plan, including a retirement plan for self-employed individuals, and under any annuity or similar contract purchased with assets distributed from that type of plan, and under any retirement annuity or account described by Section 403(b) or 408A of the Internal Revenue Code of 1986, and under any individual retirement account or any individual retirement annuity, including a simplified employee pension plan, and under any health savings account described by Section 223 of the Internal Revenue Code of 1986, is exempt from attachment, execution, and seizure for the satisfaction of debts unless the plan, contract, or account does not qualify under the applicable provisions of the Internal Revenue Code of 1986. A person's right to the assets held in or to receive payments, whether vested or not, under a government or church plan or contract is also exempt unless the plan or contract does not qualify under the definition of a government or church plan under the applicable provisions of the federal Employee Retirement Income Security Act of 1974. If this subsection is held invalid or preempted by federal law in whole or in part or in certain circumstances, the subsection remains in effect in all other respects to the maximum extent permitted by law.

(b) Contributions to an individual retirement account, other than contributions to a Roth IRA

described in Section 408A, Internal Revenue Code of 1986, or an annuity that exceed the amounts deductible under the applicable provisions of the Internal Revenue Code of 1986 and any accrued earnings on such contributions are not exempt under this section unless otherwise exempt by law. Amounts qualifying as nontaxable rollover contributions under Section 402(a)(5), 403(a)(4), 403(b)(8), or 408(d)(3) of the Internal Revenue Code of 1986 before January 1, 1993, are treated as exempt amounts under Subsection (a). Amounts treated as qualified rollover contributions under Section 408A, Internal Revenue Code of 1986, are treated as exempt amounts under Subsection (a). In addition, amounts qualifying as nontaxable rollover contributions under Section 402(c), 402(e)(6), 402(f), 403(a)(4), 403(a)(5), 403(b)(8), 403(b)(10), 408(d)(3), or 408A of the Internal Revenue Code of 1986 on or after January 1, 1993, are treated as exempt amounts under Subsection (a). Amounts qualifying as nontaxable rollover contributions under Section 223(f)(5) of the Internal Revenue Code of 1986 on or after January 1, 2004, are treated as exempt amounts under Subsection (a).

* * *

(f) A reference in this section to a specific provision of the Internal Revenue Code of 1986 includes a subsequent amendment of the substance of that provision.

In Texas, the party claiming an exemption under Section 42.0021 has the burden of proving entitlement to the exemption. *See Rucker v. Rucker*, 810 S.W.2d 793, 795-96 (Tex. App.—Hous. [14th Dist.], 1991), writ denied).[3] *Rucker* involved a divorce proceeding. The divorce decree awarded the wife one-half of the husband's, a former police officer with the Houston Police Department, "retirement plan and/or pension plan." *Id.* at 794. Six years after their divorce, the husband was injured on the job, determined to be permanently disabled, and granted a disability pension. *Id.* His wife, claiming the disability pension constituted retirement benefits, sought turnover of her awarded portion. *Id.* The trial court entered a turn over order against the husband, requiring him to turn over one-half of his interest in the disability payments. *Id.* On appeal, the husband alleged, in part, that the benefit payments were exempt under applicable state law from disbursement under a turnover order. *Id.* at 795. That law, Tex. Civ. Prac. & Rem. Code Ann. § 31.002(a)(2) and (f) refers to Section 42.0021 which provides that retirement plan payments are exempt from attachment, execution and seizure "unless they do not qualify under the applicable provisions of the Internal Revenue Code of 1986." *Id.*

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[3] *Cf. Lozano v. Lozano*, 975 S.W.2d 63 (Tex. App. – Hous. [14th Dist.] 1998, rev. denied). *Lozano*, born out of the same court as *Rucker*, is the only case that comments on a shifting burden of proof under Section 42.0021. It has been flatly criticized within the same court. Justice Yates dissented from the majority stating that, in holding that the objecting party has the burden to demonstrate the account qualified under the IRC, the court ignored the *stare decisis* impact of *Rucker*, which held that the burden lay entirely with the party claiming the exemption. *Id.* at 70. The Texas Supreme Court has not weighed in on the issue.

The *Rucker* court reiterated the long standing law in Texas regarding the applicable burden of proof: "It is the burden of the party claiming the exemption to prove that he is entitled to it." *Id.* at 795-96, *citing Hammerman & Gainer, Inc. v. Bullock*, 791 S.W.2d 330 (Tex. App. Austin 1990, no writ) (one claiming statutory tax exemption has burden of proof), *Texas Commerce Bank v. McCreary*, 677 S.W.2d 643 (Tex. App. – Dallas 1984, no writ) (one claiming homestead exemption has burden of proof), *Jones v. Latham*, 671 S.W.2d 612 (Tex. App. – Eastland 1984, writ ref'd n.r.e.) (one claiming Securities Act exemption has burden of proof). The court applied this burden of proof, which amounted to one of production, to the husband, finding that he had failed to introduce evidence "showing qualification under the Internal Revenue Code of 1986." *Id.* at 796. *Accord Santibanez, M.D. v. Wier McMahon Co.*, 105 F.3d 234, 235 (5th Cir. 1997) (*citing Roosth v. Roosth*, 889 S.W.2d 445, 459-60 (Tex. App. Houston [14th Dist.] 1994, writ denied); *Jacobs v. Adams*, 874 S.W.2d 166, 167 (Tex. App. – Houston [14th Dist.] 1994, no writ); *Dale v. Finance Am. Corp.*, 929 S.W.2d 495, 498-99 (Tex. App. – Texarkana 1996, no writ).

The Bankruptcy Court completely ignored this substantive burden of proof standard and the District Court, although noting the standard, erroneously applied it under Bankruptcy Rule 4003(c) to the burden established by Section 42.0021(a).

3. Federal Rule of Bankruptcy Procedure 4003(c)

Once the debtor claims property as exempt under Section 522(b) it is *prima facie* valid unless a

creditor objects. Once the creditor objects, the focus shifts to the validity of the creditor's objection. If there is an objection to a debtor's claim of exemption, the asset is no longer deemed exempt under Section 522. 11 U.S.C. § 522(l). *See generally Taylor v. Freeland & Kronz, et al.*, 503 U.S. 638 (1992).

Experience demonstrates that, when an objection to exemption is filed, especially where the exemption is based on state law, bankruptcy courts tend to ignore the burden of proof required under state law regarding the claimed exemption[4] focusing instead on the burden of proof expressed in Rule 4003(c) of the Federal Rules of Bankruptcy Procedure.

Rule 4003(c) provides:

> **(c) Burden of Proof**. In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall

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[4] Because 11 U.S.C. § 522(l) deems a debtor's assets exempt as listed under subsection (b), section 522(l) completely ignores the burden of proof placed on the debtor pursuant to applicable state law. It makes no sense that a debtor should benefit from claiming a state exemption yet have no responsibility to show that he is entitled to the exemption. For this reason, at least one court in Texas found that, under Bankruptcy Rule 4003(c), the debtor has the initial burden of production to establish that the asset qualifies for the exemption claimed under state law. *See In re Foster*, 360 B.R. 210, 213-14 (Bankr. E.D. Tex. 2006). Unfortunately, the courts in the instant case chose not to follow *Foster*. Accord *In re Jarboe*, 365 B.R. 717, 721 (Bankr. S.D. Tex. 2007) ("It is the burden of the party claiming an exemption under § 42.0021 of the Texas Property Code to prove that he is entitled to it.").

determine the issues presented by the objections.

There are cases in Texas interpreting Bankruptcy Rule 4003(c) to place the burden of proof on the objecting party to prove the debtor is not entitled to the claimed exemption.[5] *See e.g., In re Cole*, 205 B.R. 382 (Bankr. E.D. Tex. 1997). However, these cases, including *Cole*, ignore the burden required under applicable state law exemptions and have not delineated whether the burden of proof includes both the burden of persuasion and the burden of production.

4. The Burden of Proof Under Section 42.0021 (Substantive Law) Should Prevail Over Bankruptcy Rule 4003(c) (Procedure)

The Federal Rules of Bankruptcy Procedure are promulgated by this Court pursuant to the authority granted in 28 U.S.C. § 2075. Section 2075 provides that this Court "shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cased under title 11." 28 U.S.C. § 2075. The section further provides, however, that "[s]uch rules shall not abridge, enlarge, or modify any substantive rights." *Id.*

In *Raleigh, supra*, this Court, in analyzing "the burden of proof on a tax claim in bankruptcy court when the substantive law creating the tax obligation

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[5] The Bankruptcy Court cited *Cole* in his bench ruling. The District Court and Friedheims also relied on *Cole* as authority for placing the burden of proof on Cadle at the hearing on its Objection to Exemptions.

puts the burden on the tax payer" held that "bankruptcy does not alter the burden imposed by the substantive law." *Id.* at 17. In *Raleigh*, the president of a corporation purchased an airplane out of state and moved it to Illinois. *Id.* at 17. The State of Illinois claimed the purchase was subject to that State's use tax. *Id.* at 18. The State of Illinois may issue a Notice of Tax Liability against the entity and a Notice of Penalty Liability against any corporate officer responsible for paying the tax. *Id.* At the time the State of Illinois determined that a tax was delinquent, the company was out of business and the responsible officer was in bankruptcy. *Id.* The State of Illinois filed a Notice of Penalty Liability against the individual officer/debtor. *Id.* Illinois law shifts the burden of production and persuasion from the State to the responsible officer, once the Notice of Penalty Liability is issued. *Id.*

This Court further noted that "[g]iven its importance to the outcome of cases, we have long held the burden of proof to be a 'substantive' aspect of a claim." *Id.* 20-21. ("That is, the burden of proof is an essential element of the claim itself; one who asserts a claim is entitled to the burden of proof that normally comes with it."). The Court rejected the notion that merely because the issue involved a "claim" that bankruptcy, rather than state substantive law, should control, particularly when the issue does not involve distribution of assets but rather "the validity of claims in the first instance." *Id.* at 16, *citing Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 161 (1946) ("...*Vanston* specifically states [that validity of claims] is to be determined by reference to state law."). Finally, it is significant that the Court notes one

reason for shifting the burden of proof is that the party with the most access to sources of proof is the taxpayer. *Id.* at 21 n. 1.

Further, the precedents under the *Erie* doctrine dictate that federal courts must apply state law when the issue is one of substance and federal law when the issue is one of procedure. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Although the distinction between substance and procedure is not always clear, this Court has held that state rules apply as to burdens of proof. *See* Wright & Kane, *Federal Practice and Procedure: Federal Practice Deskbook § 62* ("Commentators were critical of the distinction [between substance and procedure], but it gave no undue difficulty in the early years of the *Erie* era, when the most notable Supreme Court decisions were those holding that the federal court must apply state rules as to burden of proof," *citing Palmer v. Hofman*, 318 U.S. 109 (1943)).

In *Palmer*, this Court held that the burden of proving a claim is a question of local law which the federal courts must apply. *Palmer*, 318 U.S. at 117. In *Palmer*, that case, this Court analyzed claims for contributory negligence based on common law and Massachusetts statute. *Id.* at 116. Rejecting respondents' argument that Federal Rule of Civil Procedure 8(c) states that contributory negligence is an affirmative defense, thereby placing the burden on petitioners, this Court found that because the contributory negligence claim was based on state law, the federal court erred by not applying the burden of proof prescribed under state law to prevail on a contributory negligence claim. *Id.* at 117-18.

Similarly, in *Cities Service Oil Company v. Dunlap*, the petitioner claimed under Texas law that the burden of proof was on the party attacking petitioner's legal title to property where petitioner was a bona fide purchaser for value without notice. *Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208, 210 (1939). The District Court and Court of Appeals ruled that the issue was one of practice or procedure, reasoning that the question concerned what the proper practice was in courts of equity and found that practice followed in Texas courts was not controlling since Texas did not have courts of equity. *Id.* at 211-12. This Court expressly rejected their reasoning that the issue concerned only practice in courts of equity and found that petitioner was entitled to the protection afforded under Texas law.[6] *Id.*

Notably, one bankruptcy court, dealing with a situation involving an exemption claimed under state law which allocates the burden of proof to the claimant, has questioned whether "[t]he allocation of the burden of proof in [Bankruptcy] Rule 4003(c)" runs "afoul with the Supreme Court's recent decision" in *Raleigh*. *In re Barnes*, 275 B.R. 889, 898-99 n. 2 (Bankr. E.D. Cal. 2002). While the court's comments may be *dicta*, they certainly highlight the problem, inherent in the instant case, with Bankruptcy Rule 4003(c) when state law

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[6] The Fifth Circuit has adopted these decisions; however, because they simply affirmed the decisions of the courts below, *per curiam*, it does not appear they chose to follow them in the instant case. *See e.g.*, *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297, 311 (5th Cir. 1998) ("Substantive law includes not only the factual elements which must be found to impose liability and fix damages, but also the burdens of going forward with evidence and of persuasion thereon.") (citations omitted).

exemptions involving applicable burdens of proof are asserted by debtors in bankruptcy.

In *Barnes*, the debtors claimed an annuity as exemption under California law. *Barnes*, 275 B.R. at 896. The trustee objected to the claimed exemption. *Id.* The bankruptcy court overruled the objection, without prejudice, because the debtors had not claimed the annuity as exempt on their Schedule C. *Id.* at 898. In doing so, the bankruptcy court, citing *Raleigh, supra*, notes that, while the trustee has the burden of proof under Bankruptcy Rule 4003(c): "when the matter in dispute is governed by nonbankruptcy substantive law, the burden of proof is dictated by that same nonbankruptcy law." *Id.* 898-99 n. 2.[7]

In the instant case, the Bankruptcy Court did not require the Friedheims to first prove that they were entitled to exempt their IRAs under Section 42.0021, completely ignoring Texas authority which holds that the party claiming the exemption bears the burden to prove entitlement to the exemption. *Rucker*, 810 S.W.2d 793. Nor did the Bankruptcy Court require them to produce documentation of the IRAs themselves, rather than substitutes for the contents of such documents.[8]

The District Court similarly erred in its application of the burden of proof. Although it

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[7] The *Barnes* court also noted that the debtor must produce the actual documents which provide the basis for the account claimed to be exempt (an annuity contract), sustaining the "trustee's objection to the evidence offered as a substitute for the contents of the annuity policy." *Barnes*, 275 B.R. at 899 n 3.

[8] *Id.*

attempted to analyze the issue, it incorrectly determined no cases set forth the standard and, rather than undertaking an *Erie* guess or certify the issue to the Texas Supreme Court[9] to determine the proper standard under Texas law.[10] Instead, the District Court defaulted to the application of the burden of proof found under Bankruptcy Rule 4003(c).[11] Finally, because the

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[9] See Tex. R. App. P. 58.

[10] *See United Teachers Assocs. Inc. Co. v. Union Labor Life Ins. Co.*, 414 F.3d 558, 565-66 (5th Cir. 2005) ("In order to determine questions of state law, federal courts look to final decisions of the state's highest court. While decisions of intermediate state appellate courts provide guidance, they are not controlling. If a state's highest court has not ruled on the issue in question, a federal court must determine, to the best of its ability, what the highest court of the state would decide." (internal citations omitted)); *see also Nationwide Mutual Ins. Co. v. Unauthorized Practice of Law Committee*, 283 F.3d 650 (5th Cir. 2002) (recognizing that Rule 58 of the Texas Rules of Appellate Procedure permits federal appellate courts to certify questions of Texas law having no controlling Supreme Court precedent and citing to *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974), for the proposition that the certification procedure allows a federal court, within its discretion, to put a novel state law question directly to the state's highest court).

[11] While the District Court's Opinion cites several cases which state that exemptions claimed by the debtor are presumed valid and that the objecting party holds the burden of proof to rebut that presumption, none of the cases analyze the proper standard of proof when a debtor claims state exemptions. Further, the District Court's reliance on this Court's decision in *Grogan v. Garner*, 498 U.S. 279 (1991) is flawed because that decision concerned the standard of proof required in a discharge action. In that case, this Court makes no statement concerning the burden of proof applicable to a claimed state exemption. The District Court's faulty legal conclusions placed the entire burden on Cadle to prove by a preponderance of the evidence that the Friedheims IRAs were not qualified and, therefore, not exempt under Section 42.0021.

Fifth Circuit affirmed without discussion, it can only be assumed that it found the reasoning of the Bankruptcy Court and District Court acceptable.

Because the court's below applied an incorrect burden of proof, as applicable under Texas law, their decisions should be reversed.

2. Alternatively, The Court Should Adopt a Burden Shifting Standard Applicable to Bankruptcy Rule 4003(c)

Assuming, *arguendo*, the burden of proof under Bankruptcy Rule 4003(c) is applicable, regardless of the presence of a state law burden of proof as to the claimed exemption, the issue turns to what kind of burden of proof is required under Bankruptcy Rule 4003(c). Cadle contends this Court should adopt a shifting burden standard under Bankruptcy Rule 4003(c).

The Bankruptcy Court incorrectly cited *Cole* for the proposition that "[t]he burden of proof is by a preponderance of the evidence; a more likely than not test." (App. 14a) The court in *Cole* actually states:

> Under Bankruptcy Rule 4003(c), the objecting party has the burden of proving that the exemption claimed, in this case homestead exemptions, are not properly claimed. *In re Cooper*, 128 B.R. 632, 635 (Bkrtcy. E.D. Tex. 1991). *This burden is satisfied when the objecting party introduces evidence which rebuts the 'prima facie effect of the claim of exemption.' In re Lester*, 141 B.R. 157, 161 (Bkrtcy. S.D. Ohio 1991). The general rule is that the exemption

> statute favors the debtor and is to be liberally construed. When an issue is in doubt because of the burden of proof provided and the Court would be required to speculate, the party upon whom the burden of proof ultimately rests must lose. *Id.* at 162. *Thus, the exemptions claimed by the Debtors are presumed valid until proven otherwise.*

Cole, 205 B.R. at 384-85. The burden of proof, as explained in *Cole*, is **not** "preponderance of the evidence – a more likely than not test." Rather, it is that a claimed exemption is presumed *prima facie* valid until the presumption is rebutted. To rebut the presumption, the objecting party must present "*persuasive* evidence" to support the contention that the presumption of validity must be rebutted. *Id.* at 384. This is a persuasion issue, not a production issue. *Cole* stands for the proposition that once evidence is submitted to the trier-of-fact to effectively rebut the presumption – i.e., persuades - the burden of proof shifts to the party claiming the exemption to **produce** a preponderance of credible, reliable and material evidence sufficient to support the claimed exemption. *Id.* at 385.

As noted below, the imposition of a direct and all encompassing burden on the objecting creditor – often without access to the same information available to debtors or the resources to fully litigate an objection to exemption – inappropriately shifts the focus of bankruptcy from generally including all property as part of a bankruptcy estate (subject to the debtor's attempt to exclude certain exempt property) to favoring and protecting certain property claimed by debtors as exempt from the reach of creditors.

Other courts in addressing objections to exemptions have held, appropriately so, that it is simply not enough for the debtor to state a claim of exemption and then sit back and tell the creditor: "prove me wrong." *See e.g., In re Carter*, 182 F.3d 1027, 1029-30 (9th Cir. 1999); *In re Mauer*, 268 B.R. 335 (Bankr. W.D. N.Y. 2001).

In *Mauer*, the Court recognized that "exemption by declaration" did not entitle a debtor to claim an exemption in the face of an objection:

> To the extent, if any, that the burden of proof provision of Bankruptcy Rule 4003 is implicated here, the Court rules that although the ultimate burden of going forward to bring these funds squarely within the ambit of an exemption shifted to the Debtor when the Trustee timely objected to the claim of exemption on the grounds that the exemptibility or non-exemptibility of the asset depended upon the production of documentary evidence that should be in the possession of, or is reasonably available to, the Debtor. In this writer's view, much like the Official Form for a Proof of Claim requires that a claim based upon a "writing" append a copy of the "writing," a claim of exemption which would stand or fall (in litigation) upon evidence more readily available to the Debtor than to the Trustee must eventually be supported by the Debtor with the evidence, if the Trustee has timely objected. **This writer does not believe in "exemption by declaration" in the face of a timely objection; a debtor may not claim assets exempt that are not exempt at law,**

> **and then put the trustee to the burden of disproving the exemption as a matter of law.**

Id. (emphasis added). In *Mauer*, the court clearly believed that the debtor held the burden of production to show that he was entitled to his exemption upon an objection filed by a creditor.

Similarly, in *In re Foster*, *supra*, the Honorable Bill Parker, Chief Judge, United States Bankruptcy Court, Eastern District of Texas, agreed with the holding in *Mauer* in ruling that, under Bankruptcy Rule 4003(c), the objecting party had the ultimate burden of persuasion, but that the debtor held the "initial burden of production or going forward with the evidence to establish that the referenced property qualifies for the claimed exemption before the objecting party is obligated to go forward with his proof. This is consistent with Texas law which requires an exemption claimant to prove that the property claimed as exempt actually qualifies for the exemption." *In re Foster*, 360 B.R. at 213-14.[12]

Although several other Texas bankruptcy courts have not expressly adopted a burden of production

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[12] The Bankruptcy Court in this case does not address the holding in *Foster*. The District Court cited *Foster* in a footnote to its Opinion for the proposition that a debtor must do something more than merely claim the asset as exempt. However, the District Court ignores Judge Parker's statements concerning the standard and allocation of proof. Should this Court find Bankruptcy Rule 4003(c) governs objection to exemptions, the Court should hold that the Friedheims maintained the initial burden of proof to show that they were entitled to the exemption and that burden of production was not met. Opinion 7 n.2.

standard under Bankruptcy Rule 4003(c), as it applies to debtors, those courts have, at least, expressly recognized that recent cases have determined that a debtor must show something more than merely declaring an exemption. *See e.g., In re Harrington*, 306 B.R. 172, 181 (Bankr. E.D. Tex. 2003); *In re Patterson*, 128 B.R. 737, 740 (Bankr. W.D. Tex. 1991).

The reasoning of *Mauer* and the other cases noted – that a debtor is charged with the burden of production to prove entitlement to his exemption - is sound. It is the debtor, not the objector, who benefits from the exemption by keeping the claimed property out of the bankruptcy estate. Therefore, it is only logical that the debtor, who is often uniquely in possession of the documents and other resources pertinent to claiming and supporting the exemption, should bear the burden of production under Rule 4003. Thus, it was error for the Bankruptcy Court and the District Court, and the Fifth Circuit by affirming the lower court's decision, to determine that Cadle bore the entire burden of proof – both of persuasion and of production[13] – to establish that the IRAs were not qualified under the applicable IRC provisions. Therefore, the decisions of these courts should be reversed.

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[13] The District Court, citing *Foster*, recognized the existence of cases which provide that debtors must do something more than merely schedule exemptions. However, it declined to follow the sound reasoning of *Foster*, which attempted to reconcile the conflict between claiming state exemptions (which have corresponding burdens applicable thereto) and applying federal procedural rules (which contain their own burdens of proof).

CONCLUSION

This Court should grant the instant petition to consider this matter further and determine that state substantive law rather than federal procedural law (Bankruptcy Rule 4003(c)) should govern the issue of the applicable burden of proving a claimed exemption. Alternatively, this Court should adopt a shift in burden standard applicable to Bankruptcy Rule 4003(c) and rule that property claimed as exempt is *prima facie* exempt until the presumption of validity is rebutted. Once an objection is filed and "persuasive" evidence is presented to rebut the presumption of validity, the burden should shift to the debtor to "produce" a preponderance of evidence to support allowance of the claimed exemption. Because the Courts below adopted an incorrect standard of proof under Bankrutpcy Rule 4003(c) their decisions should be reversed and remanded for further proceedings.

Respectfully submitted,
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(any footnotes trail end of each document)

No. 07-10958
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In The Matter Of: JOSEPH M FRIEDHEIM; JOYCE A FRIEDHEIM, Debtors;

THE CADLE COMPANY, Appellant

v.

JOSEPH M FRIEDHEIM; JOYCE A FRIEDHEIM, Appellees

April 29, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: For CADLE CO, Appellant: Bruce William Akerly, Linda D Thai, Bell, Nunnally & Martin, Dallas, TX.

For JOSEPH M FRIEDHEIM; JOYCE A FRIEDHEIM, Appellees: Rosemary J Zine, Dallas, TX.

JUDGES: Before KING, WIENER, and ELROD, Circuit Judges.

OPINION

PER CURIAM: *

AFFIRMED. *See* 5TH Cir. R. 47.6. All outstanding motions are DENIED.

Footnotes

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

BANKRUPTCY CASE NO. 05-35210-HDH-7, CIVIL ACTION NO. 3:07-CV-0181-G

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

IN RE: JOSEPH M. FRIEDHEIM and JOYCE A. FRIEDHEIM, Debtors.

THE CADLE COMPANY, Appellant,

vs.

JOSEPH M. FRIEDHEIM and JOYCE A. FRIEDHEIM, Appellees.

August 14, 2007, Decided

August 14, 2007, Filed

COUNSEL: For The Cadle Company, Appellant: Bruce W Akerly, LEAD ATTORNEY, Linda D Thai, Bell Nunnally & Martin, Dallas, TX.

For Joseph M Friedheim, Joyce A Friedheim, Appellees: Rosemary Jeanne Zyne, LEAD ATTORNEY, Law Office of Rosemary J Zyne, Dallas, TX.

Harlin D Hale, Bankruptcy Judge, US Bankruptcy Court, Dallas, TX.

JUDGES: A. JOE FISH, CHIEF JUDGE.

MEMORANDUM OPINION AND ORDER

This is an appeal by The Cadle Company ("Cadle," "the creditor," or "the appellant") from a final order of the bankruptcy court. Cadle challenges the bankruptcy court's decision that certain Individual Retirement Accounts ("IRAs") belonging to the debtors Joseph M. Friedheim and Joyce A. Friedheim (collectively "the Friedheims," "the debtors," or "the appellees") were exempt property not included in the bankruptcy estate. For the reasons stated below, the order of the bankruptcy court is affirmed.

I. BACKGROUND

The Friedheims filed a petition for relief under Chapter 7 of the Bankruptcy Code. Brief of Appellant The Cadle Company ("Appeal") at 4. On or about May 23, 2005, the debtors filed their schedules in the bankruptcy case; they amended the schedules on July 7, 2007. *Id.* Included in the amended schedules were four separate IRAs. *Id.* The Friedheims claimed that these IRAs were exempt property under TEX. PROP. CODE ANN. § 42.0021. *Id.*

Cadle timely objected to the schedule, alleging that the debtors' IRAs were neither properly funded nor qualified under applicable non-bankruptcy law. *Id.* at 5. Cadle later withdrew its objection that the IRAs were improperly funded. *Id.* Thus, the order from which Cadle appeals considered only whether the IRAs qualified as exempt property. *Id.*

On November 14, 2006, the bankruptcy court held a hearing on Cadle's objection to the scheduling of the

IRAs. *Id.* At that hearing, the bankruptcy court determined that Federal Rule of Bankruptcy Procedure 4003(c) governed the court's inquiry and thus held that the burden of proof was on Cadle to show, by a preponderance of the evidence, that the IRAs did not qualify as exempt property under applicable non-bankruptcy law. *Id.* at 5-6. At the hearing, the Friedheims called two witnesses, including one expert, besides themselves, to testify on their behalf. *Id.* at 6. At the conclusion of the hearing, the bankruptcy court ruled that Cadle had failed to satisfy its burden of proof. *Id.* In the alternative, the court held that [*3] if the burden of proof resided with the Friedheims, they had proven by a preponderance of the evidence that the IRAs were exempt. *Id.* at 9. This appeal followed.

II. ISSUES

This appeal presents two issues: (1) which party -- debtor or creditor -- had the burden of proof when Cadle objected to the Friedheims' claim that these IRAs were exempt property under Texas law, and what is the applicable standard of proof; and (2) if the bankruptcy court correctly determined the standard, was the bankruptcy court's ruling clearly erroneous? [1]

III. ANALYSIS

A. Jurisdiction

This court exercises jurisdiction over this bankruptcy appeal pursuant to 28 U.S.C. § 158(a)(1) and Federal Rule of Bankruptcy Procedure 8001. 28 U.S.C. § 158(a)(1); Bankruptcy Rule 8001.

B. Standard of Review

In reviewing a decision of the bankruptcy court, this court functions as an appellate court and applies the standards of review generally applied in federal court appeals. *Matter of Webb*, 954 F.2d 1102, 1103-04 (5th Cir. 1992); *Matter of Coston*, 991 F.2d 257, 261 n.3 (5th Cir. 1993) (en banc) (citing *Matter of Hipp, Inc.*, 895 F.2d 1503, 1517 (5th Cir. 1990)). Conclusions of law are reviewed *de novo. [*5] Matter of Herby's Foods, Inc.*, 2 F.3d 128, 131 (5th Cir. 1993). Findings of fact, on the other hand, whether based on oral or documentary evidence, are not to be set aside unless clearly erroneous, and due regard must be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses. *See* Bankruptcy Rule 8013; see also *Herby's Foods, Inc.*, 2 F.3d at 130-31. A finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with a firm and definite conviction that a mistake has been committed." *Matter of Missionary Baptist Foundation of America*, 712 F.2d 206, 209 (5th Cir. 1983) (quoting *United States v. United States Gypsum Company*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)). Mixed questions of law and fact are reviewed *de novo. Matter of National Gypsum Company*, 208 F.3d 498, 504 (5th Cir.), *cert. denied*, 531 U.S. 871, 121 S. Ct. 172, 148 L. Ed. 2d 117 (2000). The instant appeal involves both a question of law and a question of fact. Thus, the court will review the legal issue (who has the burden of proof with regards to a scheduled exemption and what standard of proof is necessary) under a *de novo* standard, and the factual question (whether a [*6] preponderance of the evidence was in favor of the debtors) under a clearly erroneous standard.

C. Standard for Exemptions in Bankruptcy Proceedings

Under 11 U.S.C. § 522, a debtor in bankruptcy can exempt certain property from the bankruptcy proceedings and protect that property from subsequent attempts to collect on antecedent debts. 11 U.S.C. § 522(c). Within § 522 is a list of various interests in property -- real and personal, tangible and intangible -- that a debtor can exempt. *See* § 522(d). The Bankruptcy Code authorizes a debtor to choose exemptions available under state law or to rely on the exemptions provided in § 522(d). *See* § 522(b)(2). In this case, the Friedheims elected the exemptions allowed by Texas state law. They scheduled the four IRAs at issue as exempt under TEX. PROP. CODE ANN. § 42.0021, which provides that retirement plans are exempt as long as they qualify under certain sections of the Internal Revenue Code.

Under TEX. PROP. CODE ANN. § 42.0021, a party claiming the exemption has the initial burden of demonstrating that the interest in question is of a type listed in § 42.0021. See *Lozano v. Lozano*, 975 S.W. 2d 63, 67 n.4 (Tex. App. -- Houston [14th Dist.] 1998, pet. denied). However, because § 42.0021 states that the interest is exempt "*unless* the plan, contract, or account does not qualify under the applicable provisions of the Internal Revenue Code of 1986," TEX. PROP. CODE ANN. § 42.0021 (emphasis added), the burden on the claimant ends with this minimal showi· g. See *Lozano*, 975 S.W. 2d at 67 n.4. The claimant need not "affirmatively prove that [the interest] qualifies under the [Internal Revenue Code]." *Id.;* see also *In re Jarboe*, 365 B.R. 717, 721-22 (Bankr. S.D. Tex. 2007) ("It is the

burden of the party claiming an exemption under § 42.0021 of the Texas Property Code to prove that he is entitled to it. But combined with the liberal rule of construction, evidence that an account is an IRA is sufficient to establish that it is exempt, unless evidence is presented that the IRA does not qualify for exempt treatment under the Internal Revenue Code.") (internal citations omitted). Neither the parties nor this court were able to find an articulation by the Texas state courts of the applicable standard of proof which must be met by the objecting party. That is, while *Lozano* makes clear that the burden is on the objecting party, it does not explain whether the burden is satisfied by a preponderance of the evidence or some more stringent standard.

While Texas state law may be silent on the subject, the Federal Rules of Bankruptcy Procedure give an indication of the applicable standard. FED. R. BANKR. P. 4003(b) allows a party to object to the debtor's claim of exemption. FED. R. BANKR. P. 4003(c) provides that "[i]n any hearing under [Rule 4003], the objecting party has the burden of proving that the exemptions are not properly claimed." For its part, the Fifth Circuit has not interpreted this standard. However, because several bankruptcy and district courts within the Fifth Circuit have applied this provision in the past, the court is not writing on a blank slate.

The court finds *In re Cole*, 205 B.R. 382 (Bankr. E.D. Tex. 1997), instructive on the applicable burdens of proof when an exemption is claimed. Exemptions claimed by the debtor are presumed valid until proven otherwise. *Id.* at 384-85; see *Pequeno v. Schmidt*, 307 B.R. 568, 584 (S.D. Tex. 2004), *aff'd*, 126 Fed. App'x 158

(2005); *In re Harrington*, 306 B.R. 172, 181 (Bankr. E.D. Tex. 2003) (merely claiming the exemption establishes a prima facie claim that the interest is exempt). [2] [*9] To overcome the presumption of exemption, the objecting party must provide evidence in rebuttal. See *In re Cole*, 205 B.R. at 384; *Pequeno*, 307 B.R. at 584. "When an issue is in doubt because of the proof provided and the Court would be required to speculate, the party upon whom the burden of proof ultimately rests must lose." *In re Cole*, 205 B.R. at 384. Other courts within the Fifth Circuit have held that the objecting party must support its objection by a preponderance of the evidence. See *In re Soza*, 358 B.R. 903, 906 (S.D. Tex. 2006).

In the instant case, Cadle urges the court to replace the standard applied by the various district and bankruptcy courts of the Fifth Circuit with a shifting burden of proof adopted by the Ninth Circuit. *See* Brief of Appellant at 14 (citing *In re Carter*, 182 F.3d 1027 (9th Cir. 1999)). Under this shifting burden standard, while the burden of persuasion rests at all times with the objecting party, the burden of production shifts between the debtor and the objecting party. The debtor must make an initial showing to demonstrate that the claimed exemption is qualified under the terms of the statutory exemption; the defendant then must offer some evidence in rebuttal of that evidence. Notably, Cadle does not offer a standard that must be met in order to consider the objecting party's showing to be sufficient rebuttal evidence. The ultimate burden of production then falls on the debtor to come forward with unequivocal evidence to demonstrate that the exemption is proper. The court is unpersuaded by Cadle's arguments in favor of adopting this new

standard. Rather the court will apply the plain meaning of FED. R. BANKR. P. 4003(c) and the Texas common law.

Once the Friedheims made their minimal showing that the IRAs in question were an interest of a type exempt under TEX. PROP. CODE ANN. § 42.0021, the burden was on Cadle to demonstrate that the IRAs were not exempt. Presumably, Cadle needed to satisfy its burden by a preponderance of the evidence. See *Grogan v. Garner*, 498 U.S. 279, 286, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991). Accordingly, the court finds that the bankruptcy court applied the proper legal standard for resolving the exemption issue. Thus, for Cadle to be successful on this appeal, it must prove that the factual determinations made by the bankruptcy court were clearly erroneous.

D. Review of Factual Findings for Clear Error

In the brief in support of its appeal, Cadle points to no evidence from the bankruptcy court record indicating clear error. In fact, Cadle points to no evidence in support of its contention that the IRAs in question did not qualify as exempt property under Texas state law. Rather, Cadle only directs the court to equivocations of the debtors' witnesses on the question of whether the IRAs are qualified. However, because the court concludes that the burden was on Cadle to prove by a preponderance of the evidence that the plans were not qualified, the witnesses' uncertainties do not rise to the level of evidence demonstrating that the IRAs did not qualify under TEX. PROP. CODE ANN. § 42.0021. In other words, testimony by the debtors and their witnesses that they are unsure whether the plans meet

the requirements of the Internal Revenue Code is not evidence that the plans do not meet the requirements of the Internal Revenue Code. Cadle directs the court to no testimony, documents, or other evidence in the record showing that it met its burden of proving, by a preponderance of the evidence, that these IRAs did not qualify as an exempt property. Accordingly, the bankruptcy court's decision that Cadle failed to meet its burden was not clearly erroneous.

III. CONCLUSION

For the above reasons, the bankruptcy court's order denying Cadle's objection is AFFIRMED.

SO ORDERED.

August 14, 2007.

A. JOE FISH

CHIEF JUDGE

Footnotes

1 Cadle also raises the issue of whether a court can make a ruling in the alternative as was done by the bankruptcy court in this case. It offers no legal authority to support its argument that such rulings are improper. Moreover, it has been the experience of this court that such rulings are both proper and efficient. The bankruptcy court's holding was internally consistent. The bankruptcy court found that the burden of proof rested with Cadle, which needed to prove, by a preponderance of the evidence, that the IRAs were not

qualified. By its terms, the preponderance of evidence standard requires that the party on whom the burden of proof lies to prove its position by more than 50 percent of the evidence. See Matter of Bell Petroleum Services, Inc., 3 F.3d 889, 909 (5th Cir. 1993) (Parker, J., concurring) ("Civil cases are decided by a preponderance of the evidence . . . . Evidence by 'fifty-one percent,' or to the extent of 'more likely than not,' is deemed sufficiently reliable . . ."). The bankruptcy court's alternative holding was analytically proper. Whether the burden was on the debtor or the creditor, the bankruptcy court found that more than 50 percent of the evidence weighed in favor of the debtors.

2 There is at least some indication that the debtor must do slightly more than schedule the interest as exempt. That is, as stated by the court in *Lozano*, the debtor must demonstrate that the interest is of a type for which the exemption is applicable. See *In re Foster*, 360 B.R. 210, 213-14 (Bankr. E.D. Tex. 2006) (citing *Lozano*, 975 S.W. 2d at 67).

11/14/2006

CASE NO. 05-35210-HDH-7 CHAPTER 7
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:

JOSEPH M. FRIEDHEIM AND, JOYCE A. FRIEDHEIM, Debtors

THE CADLE COMPANY, Objecting Party

vs

JOSEPH M. FRIEDHEIM A. JOYCE A. FRIEDHEIM, Respondents

ORDER ON THE CADLE COMPANY'S OBJECTION TO DEBTORS' SCHEDULE C EXEMPTIONS

THIS CAUSE HAVING COME BEFORE THIS COURT on November 14, 2006, on The Cadle Company's Objection to Debtors' Schedule C Exemptions, and the Court, having considered the evidence presented and having heard the argument of counsel, it is ORDERED that.

1. Pursuant to previous Orders of this Court, The Cadle Company has withdrawn all of its objections to Debtors' Schedule C Exemptions except its objection that the Debtor Joseph Friedheim's Fidelity Investments Roth IRA in the scheduled amount of $230,065; and Co-Debtor Joyce Friedheim's Fidelity

Investments Roth IRA in the scheduled amount of 67,664, Fidelity Investments SIMPLE IRA in the scheduled amount of $63,083, and T.Rowe price Roth IRA in the scheduled amount of $63,063 are not qualified under applicable provisions of the Internal Revenue Code of 198

2. Pursuant to Federal Rule of Bankruptcy procedure 4003(c), the objecting party bears the burden of proving that the Debtors' exemptions are not properly claimed. The burden of proof is by a preponderance of the evidence; a more likely than not test. See In re Cole, 205 B.R. 382 (Bankr. E.D. TX 1997).

3. The Cadle Company has not met its burden of proof that the exemptions claimed regarding the four IRA's are not proper.

4. Alternatively, if the Court' reading of Federal Rule of Bankruptcy procedure 4003(c) and the case law is not correct, the question before the Court would be whether it is more likely than not that the IRA's are exempt under Texas and federal law based on the record made at the hearing. The testimony of the Debtors ties the documents to the IRA's at issue to this Court's satisfaction. All four IRA's are sold by reputable national firms. The testimony of Debtors' expert was persuasive. If the Debtors have the burden of proof, they have met it by a preponderance of the evidence.

5. To the extent that this ruling is reviewed by a higher court, the testimony of the Debtors, Andrea. Hundley, and William Smothermon was credible and

persuasive. This Court observed all four witnesses testify and it is convinced by a preponderance of the evidence that all four IRA's claimed by the Debtors as exempt are exempt.

END OF ORDER